BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

YOUR SNOQUALMIE VALLEY, DAVE EIFFERT, WARREN ROSE, and ERIN ERICSON,

Petitioners,

v.

CITY OF SNOQUALMIE

Respondent,
and,

SNOQUALMIE MILL VENTURES, LLC and ULTIMATE RALLY, LLC,

Intervenors.

CASE NO. 11-3-0012

FINAL DECISION AND ORDER

SYNOPSIS

The City of Snoqualmie adopted Ordinance 1086, Preannexation Zoning, and Resolution 1115, a Preannexation Agreement, in preparation for annexation of territory in the City's associated UGA. Citizens challenged the actions for GMA and SEPA non-compliance. The Board found adoption of the Preannexation Agreement, which deferred mandates of Annexation Policies in the City's Comprehensive Plan, did not comply with RCW 36.70A.120 because the City failed to act in conformity with its plan.

Reviewing the SEPA challenge, the Board found one of the named petitioners had exhausted administrative remedies by commenting on the DNS, satisfying WAC 197-11-545(2). The Board ruled her challenge of Ordinance 1086 satisfied RCW 43.21C.075 and was not an 'orphan' SEPA issue. However, comparing existing zoning and existing use with

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the provisions of Ordinance 1086 and Resolution 1115 respectively, the Board concluded the City's Determination of Non-Significance was not clearly erroneous.

The Board remanded both actions to the City for submission to the Department of Commerce pursuant to RCW 36.70A.106 and remanded Resolution 1115 for action to comply with RCW 36.70A.120.

BACKGROUND

Petitioners are citizens who oppose two of the City of Snoqualmie's actions preceding proposed annexation of a portion of its associated UGA known as the Mill Planning Area. The area is the site of a former Weyerhaeuser lumber mill located adjacent to the Snoqualmie River and just above Snoqualmie Falls. Snoqualmie Mill Ventures, LLC (SMV) and Weyerhaeuser Real Estate Development Company (WREDCo) are the property owners of the potential annexation area. SMV leases a substantial portion of its property to Ultimate Rally, LLC dba DirtFish Rally School (DirtFish), which operates a rally car driving instructional school. The property is also used for special events including Rally Cross racing.

The City's annexation of the Mill Planning Area was proposed by King County in January, 2011.[1] In March, 2011, the Snoqualmie City Council authorized negotiations with King County for annexation by interlocal agreement.[2] The City then undertook four actions:[3]

- Zoning to become effective upon annexation [Preannexation Zoning] adopted as Ordinance 1086 on October 24, 2011
- Approval of a Preannexation Agreement with SMV, WREDCo, and DirtFish, adopted by Resolution 1115, October 24, 2011

[1] Declaration of [Mayor] Matthew Larson in Support of City of Snoqualmie's Dispositive Motion (Feb. 9, 2012), at 2.
[2] Resolution 992, March 20, 2011
[3] Summarized in City of Snoqualmie's Response to Motion for Leave to File Supplemental Evidence, at 6

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- Interlocal Agreement for annexation,[4] adopted by the City November 28, 2011, and still pending before the King County Council
- Annexation Ordinance – not yet introduced

With the adoption of Ordinance 1860, the City enacted Preannexation Zoning for the area, essentially adopting the zoning previously indicated in its long-range plan. At the same time, the City enacted Resolution 1115, authorizing the Mayor to enter into a Preannexation Agreement with the property owners and DirtFish, whereby the DirtFish operation was recognized as an allowed use subject to a number of voluntary restrictions.

Petitioners challenged the City's adoption of Ordinance 1086 and Resolution 1115 in King County Superior Court under the Land Use Petition Act (LUPA) Chapter 36.70C RCW.[5] Petitioners also filed GMA challenges before the Board. In response to the City's dispositive motions, the Board determined it had jurisdiction to review Resolution 1115.[6] The Board ruled the Preannexation Agreement is a *de facto* amendment of the City's Comprehensive Plan in that it defers preparation of the annexation implementation plan required by the Comprehensive Plan's Annexation Policies.[7]

The parties subsequently filed their prehearing briefs and exhibits.[8] The Hearing on the Merits was convened April 19, 2012, at Snoqualmie City Hall. Present for the Board were Margaret Pageler, presiding officer, William Roehl, and Joyce Mulliken. Petitioners appeared by their attorney Julie Ainsworth-Taylor. Petitioners Warren Rose and Erin Ericson attended in person. The City appeared by its attorney Pat Anderson, with Mayor

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[4] Annexations are not subject to SEPA or to review by the GMHB. RCW 43.21C.444
[5] Declaration of Patrick B. Anderson in Support of the City of Snoqualmie's Dispositive Motions (Feb. 9, 2012) para. 2
[6] Order on Motions, March 8, 2012
[7] Comprehensive Plan Annexation Element – Element 8
[8] Petitioners' Opening Brief, March 22, 2012
Brief of Respondent City of Snoqualmie, April 3, 2012
Intervenors' Response Brief, April 4, 2012
Petitioners' Reply Brief and Petitioners' Reply in Support of Supplemental Evidence, April 12, 2012

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Matthew Larson, City Administrator Bob Larson, City Planning Director Nancy Tucker and others also in attendance. Intervenors were represented by their attorney Allison Moss. Kate Hamilton of Buell Realtime Reporting provided court reporting services.

The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

JURISDICTION AND STANDARD OF REVIEW

A. BOARD JURISDICTION[9]

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2). The Board finds Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). However, as set forth below, certain petitioners have waived objection to the adequacy of the City's SEPA review by failure to comment on the DNS. The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

B. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[10] This presumption creates a high threshold for challengers as the burden is on the Petitioners to demonstrate that any action taken by the City is not in compliance with the GMA.[11]

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[9] See, Order on Motions, March 8, 2012, regarding timeliness of service and jurisdiction to review Resolution 1115.

[10] RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

[11] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

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The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[12] The Growth Management Board is tasked by the legislature with determining compliance with the GMA. The Supreme Court explained in *Lewis County v. Western Washington Growth Management Hearings Board*:[13]

> The Board is empowered to determine whether [city] decisions comply with GMA requirements, to remand noncompliant ordinances to [the city], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

The scope of the Board's review is limited to determining whether a City has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[14] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[15] The Board shall find compliance unless it determines the City's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[16] In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[17]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth." [18] However, the

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[12] RCW 36.70A.280, RCW 36.70A.302
[13] 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).
[14] RCW 36.70A.290(1)
[15] RCW 36.70A.320(3)
[16] RCW 36.70A.320(3)
[17] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006)
[18] RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that

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City's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[19] As to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated:

> The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.[20]

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate the challenged action taken by the City is clearly erroneous in light of the goals and requirements of the GMA.

This case also includes allegations that the City violated the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, through issuance of a DNS and deferral of more complete environmental review. In reviewing issuance of a DNS, the Board similarly applies the "clearly erroneous" standard of review.[21] In addition, in any action involving an attack on the adequacy of an environmental document the decision of the governmental agency shall be accorded substantial weight.[22]

PRELIMINARY MATTERS

MOTION TO SUPPLEMENT THE RECORD

At the outset of the hearing the Board heard argument on Petitioners' Motion to Supplement the Record. The Presiding Officer ruled orally, denying supplementation as to proposed Exhibits 1-11 and granting Exhibits 12 and 13 as set forth below.

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while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

[19] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

[20] *Swinomish,* at 435, Fn.8

[21] DNS/MDNS is reviewed under clearly erroneous standard: *Murden Cove v. Pierce County,* 41 Wn.App. 515, 523 (1985); *Norway Hill v. King County,* 87 Wn.2d 267, 275 (1976); *Anderson v. Pierce County,* 86 Wn.App. 290 (1997).

[22] RCW 43.21C.090

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RCW 36.70A.290(4) provides:

> The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.[23]

Petitioners' proposed supplemental Exhibits 1-11 are documents from King County records concerning the use of the Mill property for the DirtFish rally school and Rally Cross special events, beginning with a citizen complaint in July 2010 and concluding with a County request that the City complete annexation procedures by September 2011 "to facilitate another Rally Cross Event." The Petitioners state:

> From these documents substantial assistance will be provided by the Petitioners to the Board to understand what gave rise to the City of Snoqualmie's sudden decision to annex property that has been within its Potential Annexation Area for years.[24]

The City and Intervenors object to Petitioners' proposed supplemental Exhibits 1-11.[25] The City asserts Petitioners have made no substantive argument that the supplemental exhibits are either necessary or of substantial assistance to the Board in reaching its decision, especially as the question concerning the status of the DirtFish operation under King County regulations is not within the Board's purview.[26] Intervenors object that the exhibits are not relevant, as the Board has no jurisdiction to review an annexation, and are not reliable,

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[23] The Board's Rules of Practice and Procedure state at WAC 242-03-565:

> Generally, the board will review only documents and exhibits taken from the record developed by the city, county, or state in taking the action that is the subject of review by the board and attached to the briefs of a party. A party by motion may request that the board allow the record to be supplemented with additional evidence.
> (1) A motion to supplement the record … shall state the reasons why such evidence would be necessary or of substantial assistance to the board in reaching its decision, as specified in RCW 36.70A.290(4). …

[24] Motion to Supplement, March 22, 2012, at 2

[25] Respondent City of Snoqualmie's Response to Petitioners' Motion to Supplement Record (April 3, 2012); Intervenors' Objection to Motion to Supplement the Record (April 3, 2012).

[26] Respondent's Objection, at 3-4.

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because they are fragmented email communications not indicative of official government action.[27]

The Board first addresses the assertion of both the City and Intervenors that the proposed exhibits must be excluded because they were not part of the City's record and were not materials that were before the City Council in enacting Ordinance 1086 and Resolution 1115. [28] RCW 36.70A.290(4) on its face indicates the Board may consider additional evidence beyond the materials compiled by the City:

> (4) The board shall base its decision on the record developed by the city, county, or the state *and supplemented with additional evidence* if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision. (Emphasis added)

The statutory criterion for supplementation is not whether the material was before the City Council but rather is a Board determination that the material is necessary or of substantial assistance in reaching the decision in the case.

Applying the statutory criterion to proposed supplemental Exhibits 1-11, the Board finds the proffered materials provide an interesting back-story on the events preceding the City's enactment of the challenged ordinance and resolution, but the materials are <u>not relevant</u> to the legal issues which the Board must decide. Proposed Exhibits 1-7 and 10-11 are emails or incomplete portions of e-mail chains by or between King County and City of Snoqualmie officials. These demonstrate that the various officials considered a variety of options for resolution of issues about use of the Mill property. Proposed Exhibits 8 and 9 are the County's Emergency Ordinance and Temporary Use Permit to allow a Rally Cross event on the property in April, 2011.

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[27] Intervenors' Objection at 3-4. Intervenors also note that the supplemental exhibits were not timely served. *Id* at 2.
[28] Respondent's Objection at 2, Intervenor's Objection at 4.

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These materials are not necessary to the Board's decision, which must decide only consistency with the City's Comprehensive Plan and adequacy of the City's environmental documents. The Board notes Petitioners themselves found no need to cite Exhibits 1-11 in the substantive arguments in their opening brief, except for a single reference to application of the County's P-suffix provisions.[29] Petitioners assert the supplemental exhibits "tell the story of Snoqualmie's sudden desire to immediately annex this property and to short-circuit long established procedures.…"[30] But the Board finds the record already contains facts documenting the County's initiation of the request for expeditious annexation in response to complaints about DirtFish. [31] The record also contains facts documenting that application of the County's P-suffix provisions to the DirtFish operation is an unresolved issue under County regulations.[32] Additional City-County email communications and County temporary permits issued prior to the City's adoption of the challenged actions do not substantially assist the Board and may create confusion.

The Board therefore determines proposed Exhibits 1-11 are not necessary or of substantial assistance to the Board in reaching its decision. Petitioners' Motion to Supplement the Record with Exhibits 1-11 is **denied**.

Proposed Exhibits 12 and 13 are portions of City of Snoqualmie Comprehensive Plan Capital Facilities Element – Element 7 – and Land Use Element – Element 3. WAC 242-03-630(4) permits the Board to take official notice of matters of law including, for counties and cities, "Ordinances, resolutions, and motions enacted by cities, counties, or other municipal subdivisions of the State of Washington, including adopted plans, adopted regulations, and administrative decisions."

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[29] Petitioners' Prehearing Brief at 22, fn. 66: Supp. Exs. 4, 5
[30] Petitioners' Reply, at 2
[31] Mayor's Declaration (Feb. 9, 2012) at 2, para. 4-5.
[32] Declaration of Steve Rimmer in Support of Motion to Intervene (Jan. 9, 2012) at para. 8-13; see also Exhibits G, H, and I to Declaration of Julie Ainsworth-Taylor in Support of Petitioners' Response to City of Snoqualmie Dispositive Motions (Feb 21, 2012) (these exhibits were submitted without objection).

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The Board **takes official notice** of the City of Snoqualmie Comprehensive Plan, including any portions the Petitioners or other parties have cited in support of their arguments. Proposed Supplemental Exhibits 12 and 13 are **admitted.**

ABANDONED ISSUES

WAC 242-02-570(1) provides in part "Failure to brief an issue shall constitute abandonment of the unbriefed issue."[33] Petitioners have withdrawn or abandoned the following issues:

- Petitioners withdrew challenges to Ordinance 1086 under Legal Issue 1[34] [compliance with RCW 36.70A.120] and Legal Issue 2[35] [compliance with RCW 36.70A.070(preamble)].
- Petitioners expressly abandoned Legal Issue 3,[36] challenging Ordinance 1086 for non-compliance with GMA notice and public participation requirements.
- Petitioners also abandoned allegations of failure to be guided by GMA Goal 12 [RCW 36.70A.020(12)] as asserted in Legal Issue 2.

CONCEDED ISSUE

As set forth in the Prehearing Order, Legal Issue 5 states**:**

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[33] An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue. *North Clover Creek II v. Pierce County,* Case No. 10-3-0015, Final Decision and Order (May 18, 2011), at 11.

[34] **Issue 1**: With the adoption of the challenged actions, did the City of Snoqualmie violate RCW 36.70A.120 because the City has inappropriately deferred consideration and application of annexation objectives and policies contained in the City of Snoqualmie Comprehensive Plan, Element 8 to an unspecified date in the future? Relevant objectives and policies include, but are not limited to, General Annexation Policies contained in Element 8, Section B.1 and B.2, and Planning Area Annexation Policies contained in Element 8, Section C.3 Mill Planning Area.

[35] **Issue 2:** Has the adoption of the challenged actions resulted in a *de facto* amendment to the City of Snoqualmie's Comprehensive Plan creating internal inconsistencies in violation of RCW 36.70A.070 (Preamble), specifically in regards to transportation planning (36.70A.070(6)), capital facilities planning (36.70A.070(3)), and land use planning (36.70A.070(1)), and also fail to be guided by RCW 36.70A.020(12)?

[36] **Issue 3:** With the adoption of Ordinance No. 1086, did the City of Snoqualmie fail to provide adequate public notice and participation in violation of RCW 36.70A.035, 36.70A.130(2)(a), 36.70A.140 and the City's own procedures, Snoqualmie Municipal Code Title 21 and fail to be guided by RCW 36.70A.020(11)?

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Did the City of Snoqualmie, with the adoption of Ordinance 1086 and Resolution 1115, violate RCW 36.70A.106 which requires the City to send notification of its intent to adopt GMA regulations at least 60 days prior to final adoption?

The City stipulates it did not send the required notice of intent to Commerce and acknowledges "a remand on this purely procedural issue is inevitable."[37] The Intervenors concede: "The failure to send Ordinance 1086 was an oversight. The City did not send Resolution 1115 to the Department of Commerce because it did not believe that it was a comprehensive plan amendment."[38]

The Board has previously ruled the provisions of RCW 36.70A.106 are mandatory and submission of a proposed comprehensive plan amendment to Commerce is "an unambiguous requirement of the statute."[39] Even if there is no other violation to be corrected, non-compliance with Section 106 requires a remand to the City or County.[40] Accordingly, the Board's Order remands Ordinance 1086 and Resolution 1115 to the City to bring its actions into compliance with RCW 36.70A.106.

PREFATORY NOTE

Rather than resolve the numbered Legal Issues sequentially, this Order addresses, first, the challenges to the Preannexation Zoning - Ordinance 1086 – and second, the challenges to the Preannexation Agreement - Resolution 1115.

LEGAL ISSUES AND DISCUSSION

ORDINANCE 1086

The Challenged Action

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[37] Brief of Respondent at 9
[38] Intervenors' Response Brief, at 5
[39] *McNaughton v Snohomish County*, CPSGMHB Case No. 06-3-0027, Final Decision and Order (Jan. 29, 2007) at 25
[40] *Id.* at 26; *Cameron Woodard Homeowners Ass'n v Island County*, WWGMHB Case No. 02-2-0004, Order on Dispositive Motion (June 10, 2002), at 2; *Bauder v City of Richland*, EWGMHB Case No. 01-1-0005, Final Decision and Order (Aug. 16, 2002), at 6.

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Ordinance 1086 adopts zoning for the Mill Planning Area to be effective upon annexation.[41] The annexation area is the site of a former Weyerhaeuser lumber mill, which operated from 1917 to 2006.[42] It was designated an Urban Growth Area in King County's 1994 Comprehensive Plan and subsequent updates.[43] The City's pre-GMA 1989 Snoqualmie Valley Community Plan included the site in the City's Expansion Area. The City's 1994 Comprehensive Plan and subsequent updates identified the Mill Planning Area as a potential annexation area. The majority of the proposed annexation area lies within the floodplain of the Snoqualmie River above Snoqualmie Falls.[44]

The proposed land use designations for the area are depicted in the City's Plan.[45] The City and Intervenors assert the zoning adopted in Ordinance 1086 exactly corresponds to the proposed designations and mapping in the Plan.[46] Of the almost 600 acres in the Mill Planning Area, 25 acres located outside the floodplain are zoned Planned Residential (PR),[47] the floodplain portion of the area is zoned Planned Commercial/Industrial (PC/I),[48] and areas within the floodway are zoned Open Space (OS-1 and OS-2).This zoning will become effective upon annexation.

The City prepared an Environmental Checklist for the proposed Preannexation Zoning and Preannexation Agreement as a combined proposal[49] and issued a Determination of Non-Significance (DNS).[50]

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[41] The Board notes a city's adoption of comprehensive land use plans for an area to be annexed is authorized by RCW 35.13.177. The Petitioners conceded at the Hearing on the Merits that if the Preannexation Zoning ordinance had been packaged with the City's Annexation Ordinance, it would not be subject to GMHB jurisdiction.
[42] IR 277, B.3.a.1, p. 3
[43] IR 361 at 2, D
[44] IR 277, B.3.5
[45] IR 277, B.8.f, p.7; Comprehensive Snoqualmie Falls and Mill Planning Area Land Use Designation, Figure 3.6 of Element 3 (Land Use Element)
[46] Intervenors' Brief at 7; City Brief at 21
[47] IR 63; SMC 17.15.050
[48] IR 64; SMC 17.20.050
[49] IR 277, see WAC 197-11-060(3)(b)
[50] IR 292/293 (July 27, 2011)

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Except for the requirement of notice to Commerce (Legal Issue 5) and the adequacy of SEPA review (Legal Issue 7), Petitioners have withdrawn or abandoned their challenges to Ordinance 1086. As to notice to Commerce, the City and Intervenors have stipulated to non-compliance and the Board remands the Ordinance. As to SEPA compliance, the City and Invervenors raise two preliminary objections, first, that Petitioners failed to comment on the DNS during the comment period and have forfeited their right to challenge the City's environmental analysis, and, second, that the challenge to Ordinance 1086 is an impermissible "orphan" SEPA appeal.

Failure to Comment

Intervenors contend Peitioners' SEPA challenge is barred because they failed to comment on the DNS during the SEPA comment period.[51] Under the SEPA rules, failure to comment on a SEPA document within the comment period "shall be construed as lack of objection."[52]

The City issued its DNS for the Preannexation Zoning and Preannexation Agreement on July 27, 2011, with a comment period expiring August 17, 2011.[53] Your Snoqualmie Valley submitted a comment letter on July 5, 2011, shortly before issuance of the DNS, expressing concern about the City's environmental review.[54] However, Your Snoqualmie Valley did not submit comments during the DNS comment period. Petitioners Warren Rose and Dave Eiffert did not submit comments. Petitioner Erin Ericson submitted a comment letter on August 17.[55] Ms. Ericson itemized the likelihood of the following significant adverse impacts:

(1) degradation of water quality in drainage streams,

(2) contamination of Class 1 aquifer recharge area,

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[51] Intervenors' Response Brief, at 9

[52] Professor Settle comments: "Since this provision does not purport to absolutely bar legal challenge for nonparticipation in the DEIS commenting process, apparently common law principles of waiver and exhaustion of administrative remedies would govern." Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, Section 14.01 [10], pages 14-76/77 (12/03 ed.).

[53] IR 293; extended to August 19, 2011 (IR 307, at 8)

[54] IR 231 (included with IR 255)

[55] IR 322

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(3) water quality impacts on endangered anadromous fish downstream,

(4) failure of cleanup of toxic contaminates in Borst Lake,

(5) noise from the DirtFish operations, and

(6) general government services required to serve commercial/industrial development.

WAC 197-11-545(2) indicates the effect of a member of the public not submitting comments to the lead agency during the SEPA comment period:

> **(2) Other agencies and the public**. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis, if the requirements of WAC 197-11-510 [notice] are met.

One of SEPA's purposes is to ensure complete disclosure of the environmental consequences of a proposed action before a decision is taken.[56] Participation and objection to the environmental analysis is therefore a prerequisite to a petition for review of agency SEPA compliance. [57]

As explained by the Pollution Control Hearings Board (PCHB):

> Participation in public hearings, or commenting through the environmental review process, are in some circumstances the only administrative remedy available to a party and thus are the forums in which exhaustion of remedies must occur in order for the party to later make a claim…. In this case, it is undisputed that [petitioners] did not make any comment during the environmental review process….[58]

In *Snohomish County Farm Bureau v. WSDOT*, the PCHB refused to allow SEPA standing to an organization that had vigorously opposed a project but failed to comment during the

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[56] *Kitsap County v. DNR,* 99 Wn.2d 386, 391 (1983); *King County v. Boundary Review Board*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993); *Shoreline III and IV v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (Jan. 18, 2010), at 6-7; *Tooley v City of Seattle, et al,* GMHB Case No. 11-3-0008, Order on Dispositive Motions (Nov. 7, 2011), at 19-20.

[57] *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn. 2d 861, 869, 947 P.2d 1208 (1997)

[58] *Spokane Rock Products, Inc., et al, v. Spokane County Air Pollution Control Authority*, PCHB No. 05-127, Order Granting Motion for Summary Judgment (Feb. 13, 2006), at 10; see also *Ronald Brown v Snohomish County*, SHB No. 06-035, Order (May 11, 2007), 2007 Wa Env Lexis 14, at 17.

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SEPA comment period. The PCHB noted projects evolve over time and can be revised in response to SEPA comments.

> The requirement to comment *within the delineated SEPA comment period* … provides clear guidance to parties with concerns over a project and provides an unambiguous process for the issuing agency to follow.[59]

Petitioners, except for Ms. Ericson, failed to comment on the Mill property DNS within the comment period and are therefore deemed to have waived SEPA objections.

As to Ms. Ericson, Intervenors argue that because her DNS comment letter did not raise the same legal issues argued in Petitioners' Prehearing Brief, the Board should find Petitioners' objections waived.[60] Intervenors cite the Board's decision in *Bothell, et al v. Snohomish County*,[61] barring the City of Lynnwood from pursuing a SEPA challenge. However, the exclusion of Lynnwood was based on a different provision of the SEPA Rules – WAC 197-11-545(1) - which absolutely bars appeal by a "consulted agency" that fails to submit "written comment" during the comment period. Lynnwood's exclusion was also based on different facts: the Lynnwood letter in the County's record during the comment period was not addressed to the SEPA official, did not reference SEPA documents, and in short, did not appear to be a comment on the environmental review. In short, the *Bothell* decision does not require a citizen's SEPA comment to include all the legal issues raised in a subsequent appeal.

WAC 197-11-545(2), which deals with comment by members of the public, merely requires comment "on environmental documents, within the time periods specified by these rules." WAC 197-11-550 further provides that comments on a DNS "shall be as specific as possible and may address either the adequacy of the environmental document or the merits of the alternatives discussed or both."

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[59] *Snohomish County Farm Bureau et al v WSDOT,* PCHB Nos. 10-124, 10-135, 10-138, Order Granting Partial Summary Judgment, 2011 Wa Env Lexis 62 (Sept. 21, 2011), at 20 (emphasis added)
[60] Intervenor's Response Brief, at 9
[61] CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sept. 17, 2007) at 62-64.

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The Board reads the SEPA comment provisions of WAC 197-11-545(2) as a component of exhaustion of administrative remedies. [62] Where public comment is a citizen's primary access to the administrative process, appropriate issues must first be raised before the agency. In *Citizens for Mount Vernon*,[63] a LUPA case, the Court explained: raising an issue "must be more than simply a hint or a slight reference to the issue in the record." But where "citizens participated in all aspects of the administrative process and raised the appropriate project approval issues," the Court concluded, "[i]ndividual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing."[64]

This comports with the Ninth Circuit's application of administrative exhaustion in NEPA cases. The Court has summarized the purpose as enabling "administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention in the process…. [A]lerting the agency in general terms will be enough if the agency has been given a 'chance to bring its expertise to bear to resolve the claim.'"[65]

Applying the requirements of WAC 197-11-545(2) to the facts before us, the Board finds Petitioner Ericson has standing to challenge the City's SEPA compliance with respect to Ordinance 1086 and Resolution 1115. More than "alerting the agency in general terms," her DNS comment letter raised specific concerns about the adequacy of the environmental checklist and the City's conclusions as to both Preannexation Zoning and the Preannexation

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[62] Because Intervenors cited no authority for an issue-specific limitation, the Board at the Hearing asked counsel whether they were aware of any applicable cases. Petitioners' counsel noted a recent Court of Appeals decision but cautioned that the order is unpublished. The Board and counsel for all parties are mindful of the prohibition against citation and reliance on unpublished decisions. The Presiding Officer requested Petitioner provide a link to the decision and allowed a brief response by Intervenors. The Board found the NEPA cases cited in the decision were a useful adjunct to its legal research.

[63] 133 Wn.2d at 869, citing *King County v. Boundary Review Board*, 122 Wn.2d at 670

[64] 122 Wn.2d at 869-870

[65] *Lands Council v McNair,* 629 F.3d 1070, 1076 (9th Cir. 2010) (quoting *Native Ecosystems Council v Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002); citing *Buckingham v. U.S. Dept. of Agric.* 603 F.3d 1073, 1080 (9th Cir. 2010)

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Agreement. These comments support the "technical, legal arguments" in the Petition for Review. As to the other Petitioners – Your Snoqualmie Valley, Warren Rose, and Dave Eiffert – the Board construes their lack of comment as lack of objection to the City's environmental checklist and DNS. They failed to exhaust their administrative remedies under SEPA or have waived objections, and their complaint of inadequate environmental review will not be heard.

Orphan SEPA Appeal.

Focusing on Ordinance 1086, the City and Intervenors assert that Petitioners' SEPA issue concerning Ordinance 1086 is an impermissible "orphan" SEPA appeal. Because the only remaining GMA challenge to Ordinance 1086 is for a "purely procedural" violation, Respondents argue, the SEPA challenge cannot stand.[66] Petitioners reply: "[T]he SEPA analysis attached to a legislative enactment cannot be severed just because challenges to actions squarely within the Board's jurisdiction are procedural as opposed to substantive."[67]

The Growth Management Act at RCW 36.70A.280 carefully defines the matters subject to the Board's review:

> (1) The growth management hearings board shall hear and determine *only* those petitions alleging … (a) that … a state agency, county or city planning under this chapter [GMA] is not in compliance with … chapter 43.21C RCW [SEPA] *as it relates to plans, development regulations, or amendments, adopted* under [the GMA or SMA].[68]

The Board may *only* review a SEPA challenge that is directly related to the *adoption or amendment* of a GMA or SMA plan or development regulation.[69]

This limitation is consistent with SEPA and the case law construing SEPA. SEPA itself states that all SEPA appeals must appeal "a specific governmental action" together with the

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[66] Intervenors' Response Brief, at 10; City Brief, at 19-20
[67] Petitioners' Reply, at 11
[68] Emphasis added.
[69] See also RCW 36.70A.300(1), (3a), and (3b)

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SEPA document or lack thereof. RCW 43.21C.075 states:

> (1) Because a major purpose of [SEPA] is to combine environmental consideration with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action…. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.
>
> (2)(a) Appeals under this chapter shall be of governmental action together with its accompanying environmental documents.
>
> (2)(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.
>
> (6)(c) Judicial review under this chapter shall without exception be of the government action together with its accompanying environmental determinations.

Thus, the Washington Supreme Court has held, "Interlocutory judicial review of a State Environmental Policy Act (SEPA) determination must 'without exception' be coupled with review of the final action on the application." [70] The purpose of this rule is to preclude judicial review of SEPA compliance before an agency has taken final action and to foreclose consecutive lawsuits in the same agency proceeding.[71]

In *Tooley v. City of Seattle, et al,* [72] the Board concluded it lacked subject matter jurisdiction because the petition "challenged only a SEPA document [FSEIS] without identification and appeal of an associated governmental action adopting or amending a comprehensive plan."

Petitioners here appeal two City Council enactments – Ordinance 1086 and Resolution 1115. Their SEPA challenge is clearly "linked to a specific governmental action," as required by RCW 43.21C.075(2). Their petition asks for a determination of non-compliance and

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[70] *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 294, 934 P.2d 370 (1998)
[71] *Lakeside Industries v. Thurston County,* 119 Wn.App. 886, 900, 83 P.3d 433 (2004); *State ex rel Friend and Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 251, 857 P.2d 1039 (1993).
[72] GMHB Case No. 11-3-0008, Order on Dispositive Motions (Nov. 7, 2011), at 12

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remand of the Ordinance, not merely a remand of the DNS. As the Board reads its jurisdictional statute, a city's plan amendment, adopted without adequate environmental review, can be challenged on that ground alone. It is enough for a petitioner to assert the city adopted a plan amendment without complying with SEPA. Under the City/Intervenor proposition, no challenge to SEPA compliance could ever be brought before the GMHB unless the petitioner had additional non-procedural bases for challenging the jurisdiction's action under the GMA. Respondents cite no authority for construing SEPA (or the GMA jurisdictional statute) so narrowly. The Board concludes Petitioners' SEPA challenge to Ordinance 1086 is not a prohibited "orphan" SEPA appeal.

Board Discussion

Legal Issue 7, as set forth in the Prehearing Order, states:

> **Issue 7:** With the adoption of the challenged actions, has the City of Snoqualmie violated SEPA, RCW 43.21C and its implementing regulations, including but not limited to RCW 43.21C.030 and WAC 197-11-055, because there has been no environmental review analyzing the potential significant environment impacts of the zoning applied by Ordinance No. 1086 in terms of the maximum level of development that might occur because the City erroneously deferred environmental review until additional development is proposed? In addition, does the City's failure to perform environmental review demonstrate that the challenged actions were not guided by RCW 36.70A.020(10)?

In adopting Ordinance 1086, the City prepared a SEPA Checklist and issued a Determination of Nonsignificance (DNS) combining its analysis of Resolution 1115. Petitioners challenge the adequacy of the environmental review. As previously indicated, only Petitioner Ericson has standing to assert this issue.

Ms. Ericson's comment letter states streams on the property have been channelized as drainage ditches and are vulnerable to pollution; the area is a Class 1 critical aquifer recharge area and is susceptible to the contamination likely from increased development; assessment of the contamination from the mill has never been completed, particularly to

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determine whether there are toxics in Borst Lake; and the proposed zoning will result in heavy demands on City resources for public services.[73]

Petitioners seek a Board ruling that the City's failure to conduct full environmental review prior to enactment of the challenged actions violates RCW 43.21C.030, WAC 197-11-055, and GMA Goal 10 (RCW 36.70A.020(10) – Environment). Petitioners fault the City for deferring environmental analysis. They argue SEPA does not allow the City to defer full review until specific development proposals are made; rather, as soon as a non-project proposal that will change land use is sufficiently defined, environmental impacts must be determined.[74] The Petitioners state:

> Even though SEPA grants more flexibility in the review of non-project actions, Board decision have found that a jurisdiction is to analyze potential significant environmental impacts of the non-project action, such as the zoning authorized by Ordinance 1086, "up front" and may "not wait until the project level."[75]

Petitioners contend the Preannexation Zoning Ordinance adopted zoning significantly different in its potential impacts than the prior Industrial zoning under King County. The new zoning includes residential uses [P/R][76] and a broader range of commercial uses [P/C-I]. Petitioners argue a full environmental impact statement is required because the proposed zoning creates *different types* of impacts, and cannot be deferred simply because the impacts may be *less intense* than those from industrial uses.[77] Thus Petitioners assert the DNS is insufficient.

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[73] IR 322, para 1, 2, 4, 6
[74] Petitioners' Opening Brief at 16-17, citing *Norway Hill Preservation and Protection Assoc. v King County*, 87 Wn.2d 267 (1976), *King County v Washington State Boundary Review Board*, 122 Wn.2d 648, 664 (1993) and WAC 197-11-055.
[75] Petitioners' Opening Brief, at 19, citing *Henderson v Spokane County/McGlades,* EWGMHB Case No. 08-1-0002, Final Decision and Order (Sep. 5, 2008), at 19; *Hood Canal v Jefferson County*, WWGMHB Case No. 03-2-0006, Compliance Order (Oct. 14, 2004), at 10.
[76] As previously noted, only 25 acres of the 600-acre annexation area are zoned Planned Residential. DNS Environmental Elements.8.i. But PC/I zoning allows residential uses.
[77] Petitioners' Opening Brief at 20-21

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The Board notes the City prepared a checklist considering both the Preannexation Zoning and Preannexation Agreement together. The City's SEPA official issued a Determination of Nonsignificance covering both actions. As described by the City:

> The SEPA official's thorough investigation, including consulting the Washington Department of Fish and Wildlife, the Department of Ecology, and the federal Environmental Protection Agency, and reviewing City of Snoqualmie and King County maps and GIS information relating to wetlands and streams, resulted in a determination that, subject to compliance with all city codes and regulations, and the terms and conditions of the Preannexation Agreement, neither action would have probably significant adverse impacts. …
>
> This is the "full environmental review" as required by SEPA for these proposed actions. [78]

The Board notes it is common knowledge that the Snoqualmie River Valley is flood-prone. It is also common knowledge that lumber mill operations from the last century have left a legacy of localized contamination. The City's SEPA official identified these environmental hazards specific to the Mill Planning Area and summarized the actions previously taken to address them.[79]

But her task in assessing the proposed Preannexation Zoning was to determine whether the *change in zoning* would have probable significant adverse impacts. The SEPA official therefore reviewed the uses allowed by the County's zoning code for the I (Industrial) district and the uses allowed in the City's PC/I and PR zones. She made a careful comparison between the impacts likely from uses under the County's existing zoning and the impacts of uses allowed under the City's proposed zoning. She pointed out:

> The less restrictive baseline King County Industrial zoning creates the potential for uses with greater impacts on all elements of the environment than the proposed zoning would. The uses allowed under County I zoning include heavy

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[78] City Response Brief, at 17
[79] IR 277, Environmental Checklist, B.7.a; IR 302, Staff Report, F.3-F.8

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> industrial and other uses including activities carried on outdoors including uses that could be construed as a public nuisance.[80]

The County's P-Suffix conditions require additional process but do not change the allowable uses.[81] The City's PC/I zoning does not allow heavy industrial uses, only light industry and commercial development. Further, the City's PC/I and PR zoning both have a "P prefix" which indicates the requirement for a master use and development plan incorporating mitigations, as well as project-level environmental review under SEPA.[82]

Similarly, the SEPA official reviewed the uses allowed under the County's UR (Urban Reserve) zoning and concluded the "baseline County zoning permits more intense and potentially impactive uses" than the City's Open Space districts.[83]

The SEPA official concluded:

> 15. Subject to compliance with the City's critical area, shoreline, flood hazard, clearing and grading, surface and storm water drainage and other development regulations, as well as future project-specific master planning, including consideration of the applicable comprehensive plan sub-area policies, and SEPA mitigation, the permitted and conditional uses allowed under the City's proposed PC-I, PR and Open Space zoning would not result in impacts greater than the permitted, conditional and special uses allowed under King County I and UR zoning with the property-specific P-suffix conditions.

Petitioners contend the City was required to assess the impacts of built-out development under City zoning, including impervious surface, traffic patterns and impacts on wildlife. Residential and commercial development under the City's zoning will have impacts that are different than industrial uses, they insist, particularly with respect to demands on city services.

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[80] IR 292/293, para 14; see IR 302 Staff Report, F.34 (uses allowed outright include aircraft building, tire retreading, transfer stations, and asphalt/concrete mixing plant.)
[81] IR 292/293, para. 12-14; see IR 302, Staff Report, at 5 and Appendix B "Consideration of King County P-Suffix Conditions," itemizing how City plans address each of the County's conditions.
[82] IR 292/293, para 12; see IR 64 (SMC 17.20.050(B)), and IR 63 (SMC 17.15.050(C))
[83] IR 292/293, para 13; see IR 302, at F. 37-38, County UR district permits sporting goods stores, brewery, livestock sales, kennels, destination resorts, wood products manufacturing, etc.; City OS 1 allows open space or low intensity recreation or agriculture; OS2 allows formal and active recreation and park uses.

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Petitioners rely on *King County v. Washington State Boundary Review Board.*[84] In ruling that an environmental impact statement was required for a boundary change, the *King County* Court stated: "An action is not insulated from full environmental review simply because there are no specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action." However, the following year the Legislature amended SEPA, adopting RCW 43.21C.222, to specifically exempt annexations from SEPA review. The Petitioners' objections to the DNS for the Preannexation Zoning here seem to the Board to be largely focused on the impact of annexation itself. Petitioners complain the DNS doesn't address the City's assumption of responsibility for facilities and services associated with maximum build-out. The Petitioners ask: "Where is it demonstrated that the City considered the impact on public facilities and services (e.g., sewer, water, emergency services) despite the fact that almost 600 acres will come within the City's municipal boundaries."[85] The Petitioners insist the City should have reviewed "the environmental impacts related to its assumption of jurisdiction over the Mill Planning Area."[86]The Petitioners in effect demand SEPA review of the annexation.

In the Board's view, the SEPA official appropriately limited her review of the impacts of the Preannexation Zoning ordinance to a comparison of the impacts of allowed uses under the King County zoning as conditioned by its P-suffix with the impacts of allowed uses under the City zones as conditioned by City regulations and plan requirements. WAC 197-11-330(1)(c) requires consideration of application of existing environmental regulations. [87]

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[84] 122 Wn.2d 648, 664 (1993)
[85] Petitioners' Reply at 14
[86] Petitioners' Opening Brief at 22
[87] With respect to Ms. Ericson's concerns about surface drainage and degradation of water quality, the DNS indicates the City is adopting the King County Pollution Prevention Manual, so there will be no change in the post-annexation regulatory standards. IR 302, Staff Report, at F.20.

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As the Court held in *Chuckanut Conservancy v. Washington State Department of Natural Resources*,[88] it is the incremental impacts created by the proposed action over the baseline condition that must be analyzed under SEPA: "the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area." The City SEPA official appropriately addressed the question whether replacing the existing King County I and UR zones, under the P-suffix conditions, with the City's PCI, PR, and OS zones, subject to the City's regulatory and environmental conditions, is likely to create significant adverse environmental impacts. She concluded it is not.

Pursuant to RCW 43.21C.090, the Board accords "significant weight" to the determination of the City to issue a DNS rather than a DS. The Board finds Petitioners have failed to meet their burden of proving the determination was clearly erroneous.

Conclusion on Legal Issue 7

The Board finds and concludes Petitioners have failed to carry their burden of demonstrating the environmental review for Ordinance 1086 violated RCW 43.21C.030, WAC 197-11-055, or RCW 36.70A.020(10). Legal Issue 7 is **dismissed.**

RESOLUTON 1115

The Challenged Action

Resolution 1115 is a Preannexation Agreement between the City of Snoqualmie, the Mill Planning Area property owners WREDCo and SMV, and DirtFish, the rally school operator. The Agreement defers preparation of an annexation implementation plan,[89] recognizes the existing uses on the property, imposes restrictions on changes or expansion of those uses,

[88] 156 Wn.App. 274, 285, 232 P3d 1154 (2010)

[89] Although the Board does not generally have jurisdiction to review developer agreements, the Board found the Preannexation Agreement was grounded in deferral of the City's Comprehensive Plan requirement for an annexation implementation plan and thus was a de facto comprehensive plan amendment. Order on Motions (March 8, 2012).

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requires specific mitigations or studies, and commits to a City process to consider Shoreline Management Act designations and amendments to City Code.

Limiting Board Review to a Remand of Resolution 1115

The City and Intervenor contend the Board's determination that Section A.4 of the Preannexation Agreement is a *de facto* amendment of the comprehensive plan annexation policies should result in a simple remand to the City and that the Board should decline to rule on the merits on the Petitioners' other Resolution 1115 legal issues.[90] Alternatively, they propose the Board's jurisdiction is limited to review of Section A.4.

The Board disagrees. The Board's GMA jurisdiction brings the entire Preannexation Agreement before it, but the Board's review is limited to the GMA and SEPA violations alleged in the Petitioners' PFR. These issues have been fully briefed and argued and are ripe for decision.

Legal Issue 1 – Action in Conformity with Plan

Legal Issue I, as set forth in the Prehearing Order, states:

> **Issue 1**: With the adoption of the challenged actions, [91] did the City of Snoqualmie violate RCW 36.70A.120 because the City has inappropriately deferred consideration and application of annexation objectives and policies contained in the City of Snoqualmie Comprehensive Plan, Element 8 to an unspecified date in the future? Relevant objectives and policies include, but are not limited to, General Annexation Policies contained in Element 8, Section B.1 and B.2, and Planning Area Annexation Policies contained in Element 8, Section C.3 Mill Planning Area.

RCW 36.70A.120 provides:

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

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[90] City Response Brief at 9, Intervenors' Response Brief at 3

[91] Petitioners have withdrawn their challenge to Ordinance 1086 in this Legal Issue.

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In its Order on Motions the Board determined the City's deferral of the requirement to provide an annexation implementation plan prior to annexation was in conflict with the Comprehensive Plan Annexation Policies. Petitioners now assert the City's adoption of the Preannexation Agreement in Resolution 1115 "results in the wholesale non-conformity with every single Annexation Policy contained in the Element 8(B) General Policies and in Element 8(C)(3) Mill Planning Area."[92]

In response, the City contends its determination to defer the annexation implementation plan requirement was a reasonable solution to unanticipated circumstances and was well within the discretion of the City Council. The City points out the Staff Report[93] accompanying Resolution 1115 and Ordinance 1086 assessed every requirement of the Annexation General Policies and the Mill Planning Area Policies.[94] The Staff Report indicated certain policies have been satisfied or addressed in other processes:

- Meadowbrook Bridge renovation,[95]
- remediation of lumber mill contamination,[96]
- removal of fill,[97]
- analysis and mitigation of flood risks.[98]

Certain policies are made requirements of the Preannexation Agreement:

- critical areas mapping and study,[99]
- trail right-of-way dedication.[100]

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[92] Petitioners' Opening Brief, at 9, referencing 8.B.1.2.b (adequate services) and 8.C.3.11 (comprehensive transportation analysis)
[93] IR 302 Staff Report (August 4, 2011)
[94] Element 8(b) and 8(C)(3) analyzed in IR 302, Appendix A
[95] 8.C.3.10; see IR 302, Appendix A
[96] 8.C.3.7; see IR 277, Enviromental Checklist, B.7.a; IR 302, Staff Report, F.3, F.4
[97] 8.C.3.4, see IR 302, Staff Report, F.8
[98] 8.C.3.1 through 8.C.3.6 and 8.C.3.8; see IR 302, Staff Report, F.6, Appendix A
[99] 8.B.2.9; Resolution 1115, B.4; see IR 302, F.19
[100] 8.C.3.12; Resolution 1115, A.11 and A.14

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Other policy requirements, such as planning for road and utility extensions, are identified as necessarily linked to future development proposals under the PC/I or PR zoning and therefore appropriately deferred, the Staff Report indicates.[101]

Far from "wholesale non-conformity with every single Annexation Policy contained in the Element 8(B) General Policies and in Element 8(C)(3) Mill Planning Area," as alleged by Petitioners, the record demonstrates the City considered each of the Annexation Policies in its Comprehensive Plan. The City identified particular policies which were based on the previous assumption that annexation would be initiated by a development proposal;[102] even as to those policies, their application was proposed to be deferred, not ignored.

However, while the Preannexation Agreement satisfies many of the annexation policy requirements, and deferral of the annexation implementation plan may be a logical strategy, the Annexation Policies by their plain language require preparation, review and adoption of an annexation implementation plan *prior to*, not after, City approval of an annexation.[103] Unless the City amends this provision of its comprehensive plan, the deferral cannot stand.

In *Alexanderson, et al, v. Clark County*,[104] the Court responded to the County's assertion that its disregard of its comprehensive plan requirements was a reasonable response to the new circumstances that had arisen. The Court said:

> Although it may have been reasonable for the County to attempt to hold the Tribe accountable to at least some of the regulations and ordinances through the MOU, the question here is whether the Board had jurisdiction to hear Alexanderson et al.'s petition, not whether the County's action was reasonable.

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[101] Policies 8.B.2.1, 8.B.2.3, 8.B.2.5, 8.B.2.7, 8.B.2.8, 8.B.2.9, 8.C.3.6, 8.C.3.9, 8.C.3.11, 8.C.3.13; see IR 302, Staff Report, Appendix A
[102] Policies 8.B.2.1, 8.B.2.3, 8.B.2.5, 8.B.2.7, 8.B.2.8, 8.B.2.9, 8.C.3.6, 8.C.3.9, 8.C.3.11, 8.C.3.13
[103] Policy 8.B.1.2.b
[104] 135 Wn.App. 541, 550, 144 P.3d 1219 (2006)

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The Board finds the City did not act in conformity with the Annexation Policies of its Comprehensive Plan, though it may have acted reasonably, in adopting Resolution 1115.[105] The Board is left with a firm and definite conviction that a mistake has been made.

Conclusion – Legal Issue 1

The Board finds and concludes the City's adoption of Resolution 1115 did not comply with RCW 36.70A.120 because the City failed to act in conformity with its Annexation Policies with respect to the requirement for an annexation implementation plan prior to annexation.

Legal Issue 2

Legal Issue 2, as set forth in the Prehearing Order, states:

> **Issue 2:** Has the adoption of the challenged actions[106] resulted in a *de facto* amendment to the City of Snoqualmie's Comprehensive Plan creating internal inconsistencies in violation of RCW 36.70A.070 (Preamble), specifically in regards to transportation planning (36.70A.070(6)), capital facilities planning (36.70A.070(3)), and land use planning (36.70A.070(1)), and also fail to be guided by RCW 36.70A.020(12)?[107]

The Board in its Order on Motions has already ruled in Petitioner's favor on the first element of Legal Issue 2, finding the Preannexation Agreement to be a *de facto* amendment of the City's Comprehensive Plan, specifically Annexation Policy 8.B.2.

The Petitioners' opening brief points to a number of infrastructure requirements addressed by the Annexation Policies and argues: "[T]he Resolution thwarts these policies by deferring these key analytical requirements until after the annexation is a fait accompli."[108] Petitioners particularly argue the Capital Facilities Element of the Plan, which incorporates the Water and Sewer System plans, is premised on assumptions concerning the Annexation Phasing

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[105] The Petitioners are also reasonable. One man's sport is another man's nuisance. For every fan of rally cross there is someone else oppressed by its dirt and noise. The GMA does not resolve these conflicts.
[106] Petitioners have withdrawn their challenge to Ordinance 1086 in this issue.
[107] Petitioners' Opening Brief does not assert or argue violations of the Transportation element or GMA Goal 12. These issues are abandoned.
[108] Petitioners' Opening Brief at 13.

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Schedule, including: "No *development* on the Mill Site or in future annexation areas within the six year window."[109]

The City and Intervenors respond: the referenced "six-year window" expired in 2009, no "development " is occurring on the Mill Site, and Petitioners have utterly failed to identify Capital Facilities, Land Use or Transportation Policies or Plans that are thwarted by Resolution 1115.[110]

At the Hearing on the Merits, Petitioners sharpened their argument, asserting Resolution 1115 creates an internal inconsistency with the various Annexation Policies which require planning for provision of city infrastructure and services through preparation of an annexation implementation plan. They contended an annexation implementation plan would necessitate amendments of the City's Capital Facilities (including water and sewer) and Transportation Elements. By deferring the annexation implementation plan, yet annexing and rezoning the land, the City creates the internal inconsistency of 600 acres with no planned infrastructure or services, according to Petitioners.

The Board finds Petitioners arguments too attenuated. The Board has already concluded the City's adoption of Resolution 1115, deferring the requirement for an annexation implementation plan for the Mill Planning Area, was an act not in conformity with its Comprehensive Plan and was a *de facto* amendment to its Element 8 Annexation Policies. However, Petitioners have failed to identify specific policies or plans of the Capital Facilities, Transportation, and Land Use Elements of the Comprehensive Plan that are thwarted or contradicted by provisions of Resolution 1115. Petitioners have not carried their burden on this issue.

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[109] Suppl. Ex. 12 – Element 7 at Section C.1
[110] City Response at 14-15, Intervenors Response at 4

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However, the Board reminds the City that coordinated planning for land use, infrastructure, and public services is at the heart of GMA requirements for urban growth.[111] Capital facilities and transportation elements are mandatory and must be consistent with the land use elements of a plan.[112] On remand, if the City defers annexation implementation planning for the Mill Area through a plan amendment, the City will need to clearly articulate how transportation, water, sewer, parks, public safety and other services will be planned for and how consistency with the Capital Facilities and Transportation Elements will be ensured.

Conclusion – Legal Issue 2

The Board finds and concludes Petitioners have failed to carry their burden of demonstrating the Preannexation Agreement, as a *de facto* comprehensive plan amendment, violates RCW 36.70A.070 (Preamble), specifically in regards to transportation planning (36.70A.070(6)), capital facilities planning (36.70A.070(3)), and land use planning (36.70A.070(1)), or failed to be guided by RCW 36.70A.020(12). This portion of Legal Issue 2 is **dismissed**.

Legal Issue 6 – SEPA

Legal Issue 6, as set forth in the Prehearing Order, states:

> **Issue 6:** With the adoption of the challenged actions, did the City of Snoqualmie violate SEPA, RCW 43.21C and its implementing regulations, including but not limited to RCW 43.21C.030 and WAC 197-11-055, because with Resolution No. 1115 (Pre Annexation Agreement) full environmental review has been deferred until after key planning decisions are made, contrary to SEPA's requirement to ensure that planning and decisions reflect environmental values? In addition, does the City's failure to perform environmental review demonstrate that the challenged actions were not guided by RCW 36.70A.020(10)?

Petitioners assert the City is required to analyze the environmental impacts of the current operation of the DirtFish Rally School. They contend that because a determination of

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[111] RCW 36.70A.020(1), (12)
[112] RCW 36.70A.070(3)(e); RCW 36.70A.070(6)

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compliance with King County regulations was never made,[113] the City's Preannexation Agreement cannot merely label the current use conforming even though it is allowed under the City's zoning.[114]

The City's environmental review of the Preannexation Agreement compared the existing uses of the property with the uses as restricted and conditioned by the Agreement.[115] The DNS states:[116]

> Executing the Preannexation Agreement would not have any probable significant adverse environmental impacts because the effect of the Preannexation Agreement is to *maintain the status quo* as to the baseline existing uses, require full environmental review at such time as there is a development proposal that can be meaningfully evaluated, and *place voluntarily agreed-upon restrictions on the operations* of the existing uses that do not exist under the existing baseline conditions.

Restrictions and conditions in the Preannexation Agreement include:

- B.2.2 - hours of operation
- B.2.3 - requirements concerning noise
- B.3 – limits on rally special events
- B.6 – prohibition of expansion or construction
- A.9 – prohibition on constructing racetrack or speedway
- A.11 and A.14 – dedication of trail rights-of-way
- B.4 - requirement for sensitive areas study and compliance with City critical areas regulations[117]

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[113] Outdoor driving schools are permitted outright in the County's I zone. However the County's P-Suffix for the Mill Planning Area requires an additional process for the permitting of any development. The Intervenors contend their use of existing buildings and un-improved grounds is not 'development.' The County has apparently made no final ruling. Rimmer Declaration (Jan. 9, 2012).

[114] Petitioners' Opening Brief at 22-23

[115] In addition to DirtFish and the Rally Cross events, there is also a small wood-products recycling business in the Mill Planning Area. The Preannexation Agreement, para B.1, recognizes Northfork Enterprises as a non-conforming use. None of the parties raise any issues relating to Northfork.

[116] IR 292/293, para 16 (emphasis added)

[117] SMC Chapter 19.12

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Board members may sympathize with citizens who view rally driving as environmentally assaultive, but the task of the threshold determination under SEPA is to compare existing conditions with a proposal. Here the baseline is the unmitigated DirtFish operation and the proposal adopts agreed restrictions.

Petitioners argue the City used an incorrect baseline in evaluating the impact. The Board is not persuaded. As noted in *Chuckanut Conservancy*, a proposal that "changes neither the actual current uses to which the land was put nor the impact of continued use on the surrounding environment"[118] is not a major action significantly affecting the environment. "The agency's task is to analyze the proposal's impacts against existing uses."[119]

Erin Ericson's comment letter asserted the conditions imposed on the DirtFish operation in the Preannexation Agreement did not adequately address likely significant impacts of noise and "inherent risks to water quality on a site with direct hydrologic connection to habitat for federally threatened species." [120] While Ms. Ericson's concerns about noise and water quality impacts of the DirtFish operations are understandable, the applicable regulations under County or City jurisdiction are substantially the same. The Board notes the City has adopted the County's noise regulations at SMS 8.16.050(H); therefore permissible noise levels will be the same whether or not the property is annexed.[121] The City addresses water quality risks in its existing regulations, which are being updated, including the anticipated adoption of King County's Pollution Prevention Manual.[122] The Petitioners have not demonstrated that the City's Preannexation Agreement, with its additional conditions and restrictions, would have a probable significant adverse environmental impact.

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[118] *Chuckanut Conservancy,* 156 Wn.App. at 285 (quoting *ASARCO, Inc. v Air Quality Coal.*, 92 Wn.2d 685, 706, 601 P.2d 501 (1979))
[119] 156 Wn.App at 290
[120] IR 322, para 3, 7
[121] IR 302, at F.39 and G.3
[122] IR 302, at F.20 and G.4

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Conclusion for Legal Issue 6

The Board finds and concludes Petitioners have failed to carry their burden of demonstrating the environmental review for Resolution 1115 violated RCW 43.21C.030, WAC 197-11-055, or RCW 36.70A.020(10). Legal Issue 6 is **dismissed.**

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

1) The City of Snoqualmie's adoption of Resolution 1115 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.120 in that the City did not take action in conformity with its Comprehensive Plan, specifically the Annexation Policies contained in Element 8. The Board **remands** Resolution 1115 to the City to take action to comply with the GMA as set forth in this Order.
2) Petitioners have failed to carry their burden of proof in demonstrating that the City of Snoqualmie's adoption of Ordinance 1086 and Resolution 1115 violated RCW 43.21C.030 and WAC 197-11-055 and was not guided by RCW 36.70A.020(10). Petitioners' allegations of SEPA violations are **dismissed.**
3) Petitioners have failed to carry their burden of proof in demonstrating that the City of Snoqualmie's adoption of Resolution 1115 violated RCW 36.70A.070 (preamble), specifically in regards to transportation planning (36.70A.070(6)), capital facilities planning (36.70A.070(3)), and land use planning (36.70A.070(1)). Petitioners' allegations of internal inconsistency are **dismissed.**
4) Petitioners **abandoned** or **withdrew** their challenge to Ordinance 1086 for non-compliance with RCW 36.70A.120, RCW 36.70A.070(preamble), RCW 36.70A.020 (11) and (12), RCW 36.70A.035, RCW 36.70A.130(2)(a), RCW 36.70A.140, and Snoqualmie Municipal Code Title 21.These allegations are **dismissed.**

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5) In adopting Ordinance No. 1086 and Resolution 1115, the City **failed to comply** with RCW 36.70A.106. The Board **remands** Ordinance 1086 and Resolution 1115 to the City of Snoqualmie to be submitted to the Department of Commerce for review and comment pursuant to RCW 36.70A.106. Following the 60-day review period (or shorter time if expedited review is granted), the City shall file a **Statement of Actions Taken to Comply**, indicating the City's actions in response to agency comments, if any. As to Ordinance 1086, if no comments are received, the Board will thereafter issue an order of compliance without further hearing.

6) The Board sets the following schedule for the City's compliance:[123]

Item	Date Due
Compliance Due	September 10, 2012
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	September 20, 2012
Objections to a Finding of Compliance	October 4, 2012
Response to Objections	October 11, 2012
Compliance Hearing – Location to be determined	October 20, 2012 10:00 a.m.

Dated this 8th day of May, 2012.

_____
Margaret A. Pageler, Board Member

_____
William Roehl, Board Member

[123] Pursuant to WAC 242-03-910, the City may file a motion requesting an expedited compliance hearing if it has taken action to comply with all or part of the Board's order prior to expiration of the time set for compliance.

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Joyce Mulliken, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[124]

[124] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), -840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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